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# Effect of Pre-Existing Legal Duties upon Consideration Under Restatement of Law of Contract

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## EFFECT OF PRE-EXISTING LEGAL DUTIES UPON CON- SIDERATION UNDER RESTATEMENT OF LAW OF CONTRACT

In the infancy of his legal life the average American lawyer has become familiar with a few legal principles which have been given and accepted almost as unquestioningly as the so-called laws of nature. One of these is tersely stated in *Corpus Juris*<sup>1</sup> as follows:

"A promise to do what the promisor is already legally bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already entitled the consideration is unreal. This obligation may arise from (1) the law independent of contract, or it may arise from (2) a subsisting contract."

With all the perplexing qualifications and distinctions which have descended upon most of our good old settled rules of law in recent years, this is one rule which has, comparatively speaking, been allowed to rest in peace. The American courts have not concerned themselves very much with the question of how the party said to be already legally bound, became bound, whether by previous contract or by positive law. If a party was legally bound he was legally bound and that was all there was to it. To be bound by a pre-existing contract with a third party was to be legally bound just as truly as by a rule of law. In regard to the effect of a pre-existing contractual duty with a third party upon consideration, *Corpus Juris* summarizes the result of the American decisions as follows:<sup>2</sup>

"According to the weight of authority in this country, a promise to perform an existing contract with a third person or the performance of it does not constitute a valuable consideration."

But now comes a force, too powerful to be ignored, to disturb the rest of this settled rule. In the "Restatement of the Law of Contract" now being drafted by Professor Williston of Harvard, for the American Law Institute, assisted by Professor Corbin of Yale and other eminent authorities, we find the somewhat surprising statement at Section 82(d):

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<sup>1</sup> 13 *Corpus Juris*, 351, 9 *Cyc.* 347.

<sup>2</sup> 13 *C. J.* 356

"Consideration is not rendered insufficient by the fact that the party giving the consideration is then bound by a contractual duty to a third person to perform the act or forbearance given or promised as consideration."

While the rule that pre-existing legal duties defeat consideration is not affected if the pre-existing duty arose out of a rule of law or out of a former contract with the same party, Section 82(d) distinguishes the cases in which the duty arose out of a contract with a third party and in such cases attempts to change our existing case law. That the draftsmen of the restatement are frankly seeking to work an innovation is shown by their own statement in their commentaries. Referring to Section 82(d) they say:

"Little or no judicial authority supports this distinction—Numerically, the cases holding the consideration insufficient outweigh those upholding it."

The question then arises as to whether a change in such a well settled rule of law is justified. Before entering into a discussion of the propriety of the change it will perhaps be worth while to distinguish the essentially different types of cases which have been treated as falling within the general rule first set out and give examples of each. Attention can thereby be more easily focussed upon the effect of the application of Section 82(d) of the restatement.

A leading case falling directly within the Section is *McDevitt v. Stokes*,<sup>3</sup> decided by the Court of Appeals of Kentucky in 1917. Since the facts of this case will be used repeatedly hereinafter for purposes of illustration, they will be set forth in some detail. They were as follows:

A skilled race driver named McDevitt had entered into a contract with a horse owner named Shaw to drive a well known trotting mare called "Grace" in the celebrated Kentucky Futurity race of the Kentucky Horse Breeder's Association at Lexington, in October, 1910. The purse offered provided for the payment of \$10,000 to the winner and \$300 to the owner of the dam of the winner. A corporation known as The Patchin Wilkes Stock Farm, operating near Lexington, of which Colonel W. E. D. Stokes held most of the stock, owned the dam of the

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<sup>3</sup>174 Ky. 515, 192 S. W. 681, L. R. A. 1917D, 1000.

mare Grace and Peter the Great, the sire, and also two full brothers of the mare. Influenced by the fact that a certain portion of the purse would go directly to the owner of the dam and by the more important consideration that the winning of the Futurity by the mare would enhance the reputation and value of each of the other four horses owned by his corporation, Colonel Stokes promised to pay McDevitt \$1,000 in the event of his winning the Futurity with the mare Grace. McDevitt did win the race with the mare, and brought suit for the unpaid balance of \$800.00 alleged to be due on account of Colonel Stokes' promise. The defendant demurred and the demurer was sustained. The plaintiff, refusing to plead further, took this appeal. The Court of Appeals affirmed the decision, Judge Settle having the following to say: ". . . the appellant because of his contract with Shaw, the owner of the mare 'Grace,' was already both morally and legally bound to perform the services required of him by the alleged contract with the appellee." Judge Settle in another part of the opinion also stated that McDevitt was already "in duty bound to drive."

Without discussing for the time being the question of what was intended to be meant by McDevitt's being "in duty bound" or "morally and legally bound," or adverting to the sportmanship of a nationally famous sportsman in refusing to part with the money which he had presumably promised to pay, it should be said at this time that Judge Settle decided the case not only in conformity with the established rule in America, but in conformity with the doctrine to which the Kentucky courts committed themselves as early as 1822. In the case of *Ford v. Crenshaw*,<sup>4</sup> decided in that year, the Kentucky Court of Appeals denied recovery to a carpenter in a suit against an owner of a building upon an express promise by the owner to pay because the carpenter was already under a contractual duty to another carpenter to help with the work before the defendant's promise was made. The decision of *McDevitt v. Stokes* is more than in accord with the authorities; it is typical of the orthodox mode of approach to the problem in that it unquestioningly assumes the existence of an absolute pre-existing duty, which could not have been legally extinguished before the time of the required per-

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formance. This as will be emphasized a little further along, was assuming a good deal.

Having given an example of a case of the type affected by Section 82(d) of the restatement and with which this discussion is concerned, two other types of cases falling within the general rule first set out will be exemplified and briefly commented upon.

First, that type of case in which the pre-existing duty arises from some positive rule of law<sup>5</sup> or out of the status of the party concerned or by virtue of his official position or duty to the public as an officer. Recovery is uniformly denied in such cases. Examples are: where a mother sued upon a promise to support her illegitimate child,<sup>6</sup> a finder upon a promise by the rightful owner to pay him for the return of the chattel,<sup>7</sup> a jailer upon a promise by a prisoner to pay him for attentions which it was the jailer's duty as an officer to perform.<sup>8</sup> Few people would approve of compelling an unfortunate inmate of a jail to bargain with the jailer for the necessities of life or approve of doing anything to establish a tipping system among public servants, or to further irritate the palms of policemen. The result reached in these cases seems very desirable but can be reached entirely on the grounds of public policy. This was the view of Professor Ames. He says:

"Promises given in consideration of the performance of official duties or duties to the public are not enforceable. Public policy, rather than the absence of consideration, it is submitted is the reason for denying recovery in such promises."<sup>9</sup>

The rule of these cases is unaffected by Section 82(d) of the restatement.

The second class of cases, which is sometimes confusingly associated with the one to which *McDevitt v. Stokes* belongs is the type in which the pre-existing duty arose out of a contract with the promisor rather than with a third person.<sup>10</sup> For example, cases in which losing contractors, usually taking an unfair advantage, exact from the party for whom the work is being done a new promise to pay a larger sum for the work than

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<sup>5</sup> For cases of this class see Am. Dig. II, 347 and 13 C. J. 351.

<sup>6</sup> *Crowhurst v. Laverack*, 8 Exch. 208.

<sup>7</sup> *De la O v. Pueblo*, 1 N. M. 226.

<sup>8</sup> *Trundle v. Riley*, 56 Ky. 396 (17 B. Monroe).

<sup>9</sup> 12 Harvard L. R. 519.

<sup>10</sup> 13 C. J. 353.

was originally contracted for. While certain doctrines dangerous in application, such as the doctrines of mutual rescission<sup>11</sup> and "unforeseen difficulties"<sup>12</sup> have rendered a qualification of categorical statement necessary, courts usually refuse to lend their aid to the enforcement of such promises. Since it would be very unwise for the courts to permit one party to a contract to be subjected to the annoyance of the other party bringing pressure to bear upon him to have the contract changed, the result reached in such cases seems practical and fair. This type of case can also be disposed of upon the grounds of policy and independently of any question of consideration.

The specific problem of *McDevitt v. Stokes*, with which Section 82(d) is concerned, has been very much discussed<sup>13</sup> in the past, and those who have followed closely the articles upon the question in the law journals will not be much surprised by this change of the restatement.

The English courts have always allowed a recovery in such cases. Professor Ames, who approved the English rule in his article,<sup>14</sup> thus summarizes the English law upon the point:

"As early as 1616 it was decided in *Bagge v. Slade*, 3 Bulst. 162, that an action would lie upon a promise, the only consideration of which was the performance of a prior contract with a third party. *Moore v. Bray*, 1 Vin. 310, was a similar case decided the same way in 1633. These early precedents seem to have been forgotten, but the question involved in them arose in 1860 in the Common Pleas, in the Exchequer in 1861, and in the Queen's Bench in 1866, and in all three cases the plaintiff was successful. *Shadwell v. Shadwell*, 9 C. B. N. S. 159; *Scotson v. Pegg*, 6 H. & N. 295; *Chichester v. Cobb*, 14 L. T. R. 333.

"One may safely assert, therefore, that by the law of England the performance of a contract with a third party is a consideration for a new promise, while the majority of American decisions and dicta are opposed to the doctrine of *Shadwell v. Shadwell*, it is significant that the latest decisions show a marked tendency toward the English rule. *Hume v. Decatur*, 98 Ala. 461; *Abbott v. Doane*, 163 Mass. 433; *Wilhelm v. Foss* (Mich. 1898) 76 N. W. 308."

If Professor Ames supposed that the American states were very rapidly drifting toward the English view, he would have

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<sup>11</sup> *Coyner v. Lynde*, 10 Ind. 282; *Lingerfield v. Wainright*, 103 Mo. 578, 15 S. W. 844.

<sup>12</sup> *King v. Duluth*, 61 Minn. 482; *Dickinson v. Fowler*, 114 Md. 344.

<sup>13</sup> Williston on Contracts, Vol. I, sec. 131; Pollock on Contracts, 8th ed., 195; Corbin, 27 Yale L. Jr. 362; Ames, 12 Harv. L. R. 515; Beale, 17 Harv. L. R. 71.

<sup>14</sup> 12 Harvard L. Rev. 519.

been surprised at the decision of *McDevitt v. Stokes* in Kentucky in 1917.

Professor Beale, writing in the *Harvard Law Review*<sup>15</sup> evidences an approval of allowing recovery in cases similar to *McDevitt v. Stokes* when, and only when, the new contract is bilateral; that is, he would have allowed recovery only in the event that McDevitt had promised Colonel Stokes to drive; driving without having promised Colonel Stokes to do so would not be sufficient. This was Sir Fredrick Pollock's view, and was approved by Dean Langdell of Harvard.<sup>16</sup> Professor Williston, however, tells us<sup>17</sup> that for the most part no distinction is made in the cases between bilateral and unilateral contracts as far as this problem is concerned. Applying the principle to *McDevitt v. Stokes*, it would make no difference so far as the case law on the point is concerned whether McDevitt promised Colonel Stokes that he would drive the mare Grace, or simply went ahead and drove the race after having been promised the \$1,000 for so doing. Mr. Williston states<sup>18</sup> that there is only one reported decision<sup>19</sup> which is an exception to this general statement. It appears from what has been said that a very able group of legal theorists in America have, with or without qualification, preferred the English rule over the American rule and have objected to classing cases of the type of *McDevitt v. Stokes* with the other two confusingly similar types, which Professor Ames tells us should be disposed of on the ground of public policy, without regard to the question of consideration. Furthermore, there have been a few American cases<sup>20</sup> following the English rule.

The cases allowing recovery were so overshadowed by the mass of contrary authority that the views of legal theorists approving the English rule became pretty generally forgotten. The question, however, was conspicuously reopened by Mr. Justice Cardozo, of the New York Court of Appeals, in 1917, by

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<sup>15</sup> 17 *Harvard Law Review*, 71.

<sup>16</sup> *Idem*.

<sup>17</sup> Williston on Contracts, Vol. I, sec. 131.

<sup>18</sup> See note 14.

<sup>19</sup> *I Mack*, District of Columbia, 394.

<sup>20</sup> *Hume v. Decatur Land & Imp. Co.*, 98 Ala. 561, 13 So. 368; *Hirsch v. Chicago Carpet Co.*, 82 Ill. 234; *Donnelly v. Newhold*, 34 Md. 220; 50 Atl. 513; *Abbott v. Doane*, 163 Mass. 433, 40 N. E. 197.

his decision in the case of *DeCicco v. Schweizer*.<sup>21</sup> In this case Judge Cardozo held that a promise by a father to pay an annuity to his daughter in consideration of her marriage to a certain nobleman, Count Gulinelli, was enforceable, in spite of the fact that the daughter was already under a contract to marry the count. Judge Cardozo claims to have rested his decision upon the ground that the promise ran to both of the parties to the pre-existing contract, rather than to only one of them, but the real effect of his decision was to break away from the majority rule in America, for it has been clearly pointed out by Professor Corbin that the daughter was the only real promisee, and the count was incidentally a third party beneficiary.<sup>22</sup> In this opinion Judge Cardozo says:

"The courts of this state are committed to the view that a promise by A to B to induce him not to break his contract with C is void. We have never held, however, that a like infirmity attaches to a promise by A not merely to B, but to B and C to induce them not to rescind or modify the contract they are free to abandon."

It looks very much as if Judge Cardozo did not approve of the American rule and ingeniously seized on a very slight pretext in order to avoid being bound by it.

Not very long after the report of *DeCicco v. Schweizer* appeared, Professor Arthur L. Corbin of Yale wrote the article referred to in the Yale Law Journal<sup>23</sup> in which he took this decision as an occasion to reopen the war on the American rule as applied to cases affected by Section 82(d) of the restatement. The name of the article is "Does a Pre-existing Duty Defeat Consideration." With all respect to the able arguments for the English rule made by the authorities mentioned above, it is believed that the strongest argument which has ever been made for allowing recovery in the type of cases affected by Section 82(d) of the restatement is stated in this article. While portions of it are a little difficult to read by those who are unfamiliar with the Hohfeldian terminology, his argument seems irrefutable. Furthermore, one does not have to be overly suspicious to suspect that Professor Corbin's position as one of the advisers to the draftsman of the restatement is largely responsible for the presence of Section 82(d). The remainder of this

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<sup>21</sup> 117 N. E. 807.

<sup>22</sup> 27 Yale L. Jr., 362.

<sup>23</sup> 27 Ibid.



discussion will, therefore, be taken up with and attempt to suggest in connection with the case of *McDevitt v. Stokes* the theory of the argument for the provisions of Section 82(d) urged by the man believed to be most responsible for it.

Since recovery is denied in these cases by the American courts on the theory of a pre-existing duty to a third party, our attention should be focussed upon the problem whether or not this duty did in fact exist. Judge Settle tells us in *McDevitt v. Stokes* that McDevitt was "in duty bound" to drive the mare before he dealt with Colonel Stokes. He does not tell us what he meant by being "duty bound." The first step in the direction of a solution of this question is to determine what is meant by a legal duty. Professor Corbin would determine this question solely in the light of what the courts would have compelled McDevitt to do. If the organized agents of society, the courts, would compel McDevitt to pay damages to Shaw for failing to drive the mare, then Professor Corbin would say that McDevitt was under a legal duty to drive the mare for Shaw and that Shaw had a legal right that McDevitt drive. But since the time had not arrived for McDevitt's performance, McDevitt was simply under a presumable or probable contingent duty to drive for Shaw, and not under an instant duty to do so; certainly under no absolute inextinguishable duty. (When the term "contingent duty" is used, it is not meant that there was any such contingency as exists in cases where we are accustomed to say that there is a condition precedent. All future rights and duties are conditional in a certain sense; that is, they are conditional on the passage of time with unchanged circumstances, and legal duties normally spoken of as conditional are more conditional than other future duties in that they are doubly or trebly conditional.) If, then, McDevitt was under any duty to drive the mare at the time that he dealt with Colonel Stokes, the duty should be properly described as a "presumable duty." It would perhaps have ripened into an absolute instant duty to either drive or pay damages; but in the meantime the contract between McDevitt and Shaw might have been voluntarily modified or extinguished or abandoned.

Many important changes of circumstances may arise between the time that a horse owner engages a driver and the time of the race. At the time the driver is engaged the horse

owner evidently feels that he will want the particular driver to perform on the day of the race, but before the day of the race the owner may have become so impressed with the ability of some other driver that he would be not only willingly but anxious to release the one first employed. If, then, the driver should have reason for desiring to be elsewhere he could be released from the duty presumptuously presumed to exist in the case of *McDevitt v. Stokes* by merely offering rescission of the contract. A power, certainly of more value than a peppercorn, would have been given up in the case of *McDevitt v. Stokes*, had McDevitt promised Colonel Stokes to drive the mare at all events, and even though McDevitt did not promise Colonel Stokes to drive the mare at all events he might perhaps have forbore to exercise his power to offer Shaw rescission in reliance upon Colonel Stokes' promise to pay him the money.

It is the relinquishment of this power to offer rescission, a legal power to create in the other party to the contract a power to extinguish the pre-existing duty, or the forbearance to exercise this power, that Mr. Corbin emphasizes as the obvious consideration in this type of case.<sup>24</sup> Of course it may be said that in many cases the power would be of little value because of the poor chance of the offer of rescission being accepted, but such an argument can only go to the adequacy of consideration and does not deny its existence. The argument that such a power offering rescission or modification or compromise has value may sound a bit theoretical to some people, but will probably commend itself to many office lawyers whose business it is to draft a great many contracts. They will upon reflection realize that a very large percentage of the contracts which they draw are changed or modified or entirely rescinded by subsequent writings executed by themselves. Many prospective business deals result in a whole series of contracts, each successive one extinguishing some duties and rights and creating others. Looking at the matter retrospectively, after a half dozen of such instruments have been drawn, it would be absurd to say that at the time the second or third contracts were in effect the parties were legally bound in anything more than a presumable sense. The courts have perhaps been too much influenced by the question of the degree of probability of the acceptance of the offer of rescission.

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<sup>24</sup> 27 Yale L. Jr., 362 at 371.

Possibly Judge Cardozo was unconsciously influenced in this manner when, in the case of *DeCicco v. Schweizer*, he distinguished the cases where the promise ran to both parties to the first contract rather than to only one of them. It is more likely, however, that Judge Cardozo was cleverly casting about for some pretext by which to avoid being bound by a rule of law which his mind refused to accept.

If there are persons to whom the argument that the power of offering rescission is valuable still seems tenuous, possibly one further illustration will help.

Suppose a famous jockey were under contract with a Mr. Smith to ride in a certain race of average importance in New Orleans, and that the jockey for some good reason was anxious to get out of the contract and go north. Furthermore, let it be supposed that he had not engaged himself to any horse owner for the Kentucky Derby and that Mr. Smith was extremely anxious to hire him for this race. Would not Mr. Smith's interest in securing this jockey for the Derby and for other races render it not only possible but very probable that the jockey could get out of the contract to ride in the New Orleans race upon very easy terms. Yet, under the rule of such a case as *McDevitt v. Stokes*, Colonel Stokes might appear upon the scene in New Orleans and induce this jockey to upset his plans and remain in New Orleans upon a tempting promise, and then refuse to pay with impunity.

Certainly the cases in which parties are allowed to break their promises, solemnly made and relied upon by other persons, should be limited as much as possible. So long as we have the doctrine of consideration there must of necessity be some unavoidable injustice resulting from parties relying upon the promises of other persons which are unsupported by consideration; but where there is so clearly a consideration such as we have in these cases, it seems inexcusable to be driven to an unethical result because of a line of decisions which have misapplied a general rule, the reason for the existence of which was apparently misconceived.

It may be well to emphasize that it is not here contended that a contracting party has a legal power to breach a contract and pay damages, the relinquishment of which should be a consideration. No party has any such power which he is privileged

to exercise. It is true that the courts in most cases can take no affirmative action by way of punishing the contract breaker except by giving judgment for damages, but courts always have refused to recognize the relinquishment of such an asset as a consideration for a new contract and should always continue to do so.

While it remains to be seen how far courts are to be influenced by the restatement of the law by the American Law Institute, and it is too much to hope that courts will all begin to reverse themselves on the strength of Section 82(d) as fast as the problem arises, a step in the right direction has been taken and the men who wrote the section are too big to be permanently ignored. To those to whom it seems more important to enforce promises seriously made and relied upon than to adhere to a discredited rule, this section will commend itself.

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